IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 1222 of 1999

For Approval and Signature:

Hon'ble MR.JUSTICE C.K.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

SANTOSHKUMAR DUKHIRAM SHARMA

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 1222 of 1999

MS ALPANA CHAUDHURI for Petitioner No. 1

MR OMPRAKASH SHAH for Petitioner No. 1

MR VM PANCHOLI ADDL PUBLIC PROSECUTOR for Respondent No. 1

CORAM : MR.JUSTICE C.K.BUCH

Date of decision: 14/02/2002

ORAL JUDGEMENT

#. I have heard learned counsel Ms.Arpana Chaudhry appearing for the appellant - original accused of Sessions Case No.318 / 1999. This Appeal is preferred

against the order of conviction and sentence passed by the learned City Sessions Judge dated 8th October, 1999 whereby the learned City Sessions Judge has held present appellant guilty along with other accused jointly tried of the offence punishable under Section 392 read with Section 34 IPC, also under Section 324 of IPC. Considering the stand taken by the accused, especially present appellant, the trial Judge sentenced the present appellant to undergo R.I. for period of 5 years and fine of Rs.2,000/-, in default, S.I. for three months. Present appellant is further directed to undergo R.I. for period of one and half years and to pay fine of Rs.1,000/- for the offence punishable under Section 324 of IPC, in default, to undergo further S.I. for one month.

#. Ms.Chaudhry, learned counsel for the appellant has submitted that the other accused tried with the present appellant has not preferred any Appeal against the order of conviction and sentence.

#. Learned counsel Ms.Chaudhary appearing for the appellant has taken me through relevant findings recorded by the trial Judge and the judgment assigning reasons for the conclusion recorded. Learned counsel appearing for the appellant has mainly argued that [i] it is case of mistaken identity and evidence of TI parade conducted by the Executive Magistrate has not been appreciated properly or legally; [ii] present appellant was wrongly brought to book as he was arrested for some other offence and was joined as accused by following formality of obtaining transfer warrant and his implication in the present crime is false; [iii] some independent witnesses atleast could have been examined by the prosecution as incident has occurred in the City of Ahmedabad at petrol pump where some independent witnesses must have been present; [iv] the panch witness PW-VI has turned hostile so that the facts reflected in the panchanama could not have been taken into consideration by the trial judge while appreciating TI Panchnama which describes physics of the present appellant; and [v] the story does not seem to be genuine and this must be case of simple quarrel as to payment of Rs.210/- and if the definition of Robbery is considered in reference to Section 390 IPC, present case would not fall in the category of robbery and therefore also, the accused could not have been convicted for the offence punishable under Section 392 of IPC.

#. Though it is a case of the prosecution that the present appellant was absconding for a period of six months approximately, he was not offered an opportunity

to explain the same. There is confusion as to the evidence of prosecution as to whether the accused were riding the scooter or motorbike or any other vehicle as named as Yamaha.

#. I have gone through the evidence led by prosecution and especially oral evidence of injured witness Surendrasingh whose version was accepted as trustworthy by the trial Judge. Oral evidence of the injured witness Surendrasinh gets corroboration from medical evidence and also from the FIR registered within one and half hours from the time of incident. All important principles as to appreciation of evidence, have been taken care of by the learned trial Judge. There is no element of exaggeration or no material contradiction is found on record. Of course, this witness was not knowing any of the accused but he had identified the present appellant during TI parade conducted by the Investigating Agency through Executive Magistrate - PW - I which is at Exh.50. The Executive Magistrate Ranjeetsingh Gohil has described all the details of drawing of TI parade Panchnama and the manner in which the exercise was undertaken and the fact of identification of the present appellant by the witnesses including Panch witnesses. It is accepted principle of law that if one witness is found trustworthy then, on the sole testimony of such witness, the accused can be held guilty. However, the learned trial judge, as a rule of prudence, has taken care to seek corroboration from three different sources, first is medical evidence, secondly from FIR lodged in good proximity and thirdly from other witnesses examined by the prosecution. Hostility of PW No.6 Panch Ratnakar is not important, nor it does adversely affect the case of the prosecution. Let me narrate the basic fact of the prosecution case. That on 9th November, 1997 at about 22.45 p.m., the complainant Ashoksinh Lakshmansinh Rajput was at the petrol pump known as Ajay Petrol Pump along with other employee. Two accused persons including the present appellant came to the petrol pump and ordered for fuel i.e. petrol in the motorbike. Present appellant was on the pillion seat. Undisputedly the complainant and colleagues at the petrol pump were on duty. One of the colleagues Ravindrasinh Mevasinh was counting cash at the cash counter. Neither Ashok - injured complainant or this Ravindrasinh Mevasinh was knowing the persons who were on the motor bike and they were chit chatting while fueling the vehicle. According to prosecution, the tank of the vehicle consumed 8 ltrs. petrol and the riders were to pay Rs.210/- being cost of 8 ltrs. petrol. On demand, pillion rider took out country pistol from pent's rear pocket and fired on Suredransinh. As a result,

Surendrasingh sustained injuries on his back and arm and both the riders escaped from the scene but the pistol had fallen down and same was picked up by the complainant Ashok. Thereafter, the complaint was lodged. Accused of Sessions Case No.113 / 1998 - Chhoturam Thakur was arrested but the pillion rider i.e. present appellant had absconding and was arrested by way of transfer warrant as he had disclosed certain facts to the investigating officer interrogating him in other crime where he was arrested. Thereafter, exercise of identification parade was undertaken and the present appellant was identified. Considering use of weapon and nature of offence committed, police chargesheeted both the accused, of course, differently for the offence punishable under Section 307 and 397 read with Section 114 IPC. Accused of Sessions Case No.113/1998 was also chargesheeted earlier. Sessions Case was registered against him by that time present appellant was arrested and on the strength of the supplementary chargesheet, case against him was also committed. Both accused thereafter are tried jointly. At one point of time, on perusal of the finding recording by the trial court, it transpires that the appellant had called one witness for reexamination vide Exh.54 but ultimately, they declined to reexamine said witness and resorted to further cross examination and explanations of the accused under Section 313 were also recorded. Considering the stand taken by the accused persons, the trial Judge convicted both the accused for the offence punishable under Section 392 and 324 read with Section 114 of IPC.

#. Evidence of Ex.Magistrate has been rightly found reliable by the trial judge as the same does not suffer from any material infirmity or lacuna. Undisputedly, there was no enmity between the accused or the witnesses examined by the complainant side. It is also not the case of the appellant that the owner of the petrol pump was present at the time of occurrence of the incident at petrol pump and he was not examined by the prosecution. Therefore, it would not be proper to interfere in absence of any specific case and evidence available on record that independent witnesses were available, they were identified, named even then, they were not examined by the prosecution. It can be legitimately argued that there was ample scope of presence of independent persons at the spot of incident but atleast it should come on record that these persons were ultimately identified and there was an opportunity for the investigating officer to record the statement of said persons in connection with the incident. The witnesses examined by the prosecution i.e. complainant Ashokkumar, injured witness

Surendrasingh are corroborating each other and no material contradiction in the evidence of these witnesses, which are brought on record, even it is not pointed out by the learned counsel appearing for the appellant before this Court. So injured witness has been corroborated with other witness and both the witnesses are getting corroboration from the FIR and medical evidence, obviously, there was no need even to examine the third independent witness in view of the settled proposition of law. Undisputedly, Yamaha is brand name of motor bike and there is nothing on record to show that the accused were riding a scooter. Because of the variety of the brand name in the market of motorcycle, people are naming any motorbike as Yamaha or Honda. This cannot be said to be a matter of confusion and it does not go to the root of the case of prosecution.

#. Legal submissions made by learned counsel for the appellant are also not acceptable. This is not the case of non payment of consideration of petrol purchased but this is the case of receipt of movable property - liquid petrol exercising extortion showing pistol or firing of it, is not necessary that to have preceded to the act of pouring the fuel in said vehicle. The definition in Section 390 IPC, if considered in light of the illustration given thereunder, in the extortion interpreted by various Court and considering the language of Section 390, it can be said that the argument advanced by the learned counsel appearing for the appellant is not logical and not based on legal strength, hence same is turned down.

#. learned counsel appearing for appellant has also argued alternatively that atleast substantive sentence should be altered and should be reduced atleast by one year considering the fact that the appellant is poor man running is barber shop in Amraiwadi area. However, while submitting on this count, she has submitted that the injured witness can be compensated in terms of money and substantive sentence can be reduced. Even this argument is not accepted inasmuch as, on one hand, the appellant pretends to be a poor man and on the other hand, he is offering some compensation in terms of money to injured witness Surendrasinh to have the substantive sentence reduced to some extent. The trial court has rightly considered the evidence and the fact that the injured sustained pellets injuries fired on him through country pistol used by the appellant and 9 pellets were taken out by Doctor who had treated the injured. Some amount of compensation could have been awarded by the trial court but I would not like to rewrite this part of the judgment

by altering amount of fine as there is no notice against appellant, it would not be legal to alter the amount of fine. This could have have been done by this Court but after lapse of some years, it would not be just and proper for this Court to do so. Substantive sentence awarded by the trial judge is most adequate and if appreciated in correct perspective, very liberal and lenient view is adopted by the trial judge taking into consideration financial and social background of the present appellant. Therefore, in view of this Court, further reduction in the substantive sentence is not warranted and therefore, argument on this aspect is also not acceptable accordingly.

#. This Court could have assigned more reasons to justify and uphold the finding recorded by the trial Judge but when this Court is in full agreement with the reasons assigned by the trial court, it is not necessary to record its own reason by the appellate court. So adopting the findings and reasons assigned by the trial Judge, I am inclined to dismiss this appeal and hence, the same is dismissed accordingly.

Date : 14-2-2002 [C.K.Buch, J.]

#kailash#